RECENT CASES.*

APPEAL AND ERROR—REVIEW—ADDITIONAL PROOF.—The plaintiff brought an action to recover compensation for painting a portrait of defendant's daughter. Judgment was given for the plaintiff. In the argument on appeal, by consent of counsel it was stipulated that the appellate court might compare the portrait with the daughter who was present. *Held:* Judgment reversed. The painting was not a proper likeness. *Burton v. Cornell,* 193 N. Y. S. 529 (App. Div. 1922).

The great weight of authority is that appellate courts can determine a cause only on the record of the court below and cannot without consent of the parties hear additional evidence. 4 C. J. 724; Powers v. Manning, 154 Mass. 370, 28 N. E. 290 (1891); Caldwell v. Farmers' Bank, 100 Mo. App. 23, 71 S. W. 1093 (1903). Two early Virginia cases took the opposite view however. Commonwealth v. Banks, 4 Call. (8 Va.) 338 (1798), and Auditor v. Pauly, 5 Call. (9 Va.) 331 (1804). So photographs not presented in the court below will not be considered on appeal, Carley v. Jennings, 131 Mich. 385, 91 N. W. 634 (1902); nor will an appellate court examine a model not in evidence at the trial, Gulfport Creosoting Co. v. Morrison, 103 Miss. 730, 60 So. 736 (1912); nor will it consider exhibits which were not before the lower court, Freitag v. Union Stock Yard and Transit Co., 226 Ill. 551, 104 N. E. 901 (1914); nor affidavits not offered on the trial, Merrill v. Hexter, 52 Or. 138, 96 Pac. 865 (1908).

When it is necessary to prevent a miscarriage of justice or to avoid a useless circuity of proceeding, the present tendency both by statute and by judicial decision is toward the admission in appellate courts of evidence outside the record. 4 C. J. 725. So in New York it has been held that while on appeal documentary evidence may not be supplied by the appellant for the purpose of reversing a judgment, yet it may be introduced for the purpose of affirming it. Goetz v. Duffy, 171 App. Div. 680, 157 N. Y. S. 590 (1916). In the Federal Courts evidence arising since the decree of the trial court, and hence not on the record, is admissible on appeal, within the discretion of the court. Ridge v. Manker, 132 Fed. 599, 67 C. C. A. 596 (1904). When the evidence is incontrovertible the same result is reached by statute in New Jersey, P. L. 1912, p. 382. In Kansas, the appellate court, independent of the Kansas Code of Civil Procedure, Sec. 580 (Gen. St. [1909] Sec. 6175) and under extraordinary circumstances, may receive evidence outside the record. Hess, Harder, and Holmes v. Conway, 93 Kan. 246, 144 Pac. 205 (1914), affirmed as to the 14th Amendment to the Constitution of U. S. in Holmes v.

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*The following recent cases are discussed in the Note Department, *supra:* Bailey v. Drexel Furniture Co., 42 Sup. Ct. 449 (1922); Goldin v. Clarion Photoplays, Inc., 195 N. Y. S. 455 (1922); Pathé Exchange, Inc. v. Cobb, 202 App. Div. 450 (N. Y. 1922); Markle v. Perot, 273 Pa. 4, 116 Atl. 542 (1922); Jones v. Cook, 111 S. E. 828 (W. Va. 1922); Commonwealth v. Valeroso, 273 Pa. 213, 116 Atl. 828 (1922).

Conway, 241 U. S. 624, 60 L. ed. 1211 (1915). An Ontario Rule (No. 498 [C. R. 1897]) throws the case on appeal open for the reception of further evidence whenever grounds are shown for obtaining the special leave of the court, and without leave as to matters which have occurred after the decision below. *Re* Fraser, 26 Ont. L. 508, 8 Dom. L. R. 955 (1912). The principal case is an instance of this tendency. It is doubtful, however, whether evidence not on the record and not properly before the appellate court should be heard by them solely on the ground that it was introduced by agreement of counsel, unless the matter is controlled by statute or previous decision. Such agreements have been held not to make reviewable on appeal matters which were not determined on the trial. St. Louis v. Missouri R. Co., 12 Mo. App. 576 (1882); Headrick v. Larson, 152 Fed. 93, 81 C. C. A. 317 (1907).

CONSTITUTIONAL LAW—CLASSIFICATION FOR TAXATION PURPOSES—ANTHRACITE COAL TAX.—A Pennsylvania statute imposed a tax on anthracite coal without providing for a tax on bituminous coal. The plaintiff, upon whom the tax was levied, brought a bill in equity to have the act declared unconstitutional on the ground that it violated the uniformity clause of the State Constitution. *Held* (Moschzisker, C. J., and Kephart, J., dissenting): The Act is constitutional. *Heisler v. The Thomas Colliery Company et al.*, No. 15, May Term, 1922, Pa. Supreme Ct. (not yet reported). The statute referred to is the Act of May 11, 1921, P. L. 479.

The Constitution of Pennsylvania, Art. IX, Sec. 1, provides that taxes shall be uniform "upon the same class of subjects . . ." In holding the act in question to be constitutional, the court in the principal case opposes the decision in Commonwealth v. Alden Coal Co., 251 Pa. 134, 96 Atl. 246 (1915), and Commonwealth v. St. Clair Coal Co., 251 Pa. 159, 96 Atl. 254 (1915), in which the Act of June 27, 1913, P. L. 639, imposing a similar tax, was declared unconstitutional for lack of uniformity. The Act of 1913 is practically the same as the act in question. The reason given for the decision in the principal case is that additional facts were brought to the court's attention which convinced them that anthracite and bituminous coal are so inherently different and the uses to which each is put are so diverse that the classification is justified.

It is undoubtedly true that the legislature has the power to classify subjects for purposes of taxation but such classification must have a just and equal basis and must not be arbitrary. Gulf, etc., Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666 (1897); Juniata Limestone Co. v. Fagley, 187 Pa. 193, 40 Atl. 977 (1898). Many state constitutions contain provisions as to uniformity similar to that in Pennsylvania. See Stimson, American Statute Law, 85, 86. So, a tax on animals brought into a state for grazing without taxing those brought in for other purposes is void for want of uniformity. Carbon Co. v. Routt County, 60 Colo. 224, 152 Pac. 903 (1915); Hayes v. Smith, 58 Mont. 306, 192 Pac. 615 (1920). But a different tax may be imposed upon the obligations of a private corporation than upon those of an individual.

Commonwealth v. Del. Div. Canal Co., 123 Pa. 594, 16 Atl. 584 (1889). Foreign insurance companies may be placed in a class by themselves and taxed independently and differently from domestic insurance corporations. Germania Life Ins. Co. v. Commonwealth, 85 Pa. 513 (1877). A Pennsylvania statute (Act of June 13, 1907, P. L. 640), which classifies trust companies for purposes of taxation and provides a method of determining the actual value of each share of its stock, was held constitutional in Commonwealth v. Mortgage Trust Co., 227 Pa. 163, 76 Atl. 5 (1910). Under a uniformity clause in the Colorado Constitution almost identical with that in the Constitution of Pennsylvania, the classification of mines as producing and non-producing mines, depending upon their gross proceeds, and the valuation thereof at one-quarter the amount of the gross proceeds, unless the net proceeds exceed one-quarter of the gross proceeds, in which event the net proceeds is the valuation, was held constitutional in Foster v. Hart Mining Co., 52 Colo. 459, 122 Pac. 48 (1912). See Colorado Revised Statutes, 1908, sections 5617, 5618.

It is submitted that, while there may be other grounds upon which the constitutionality of the act in question may be attacked, the decision in the principal case as regards classification is justified. It is significant that the dissenting opinions rested solely on the doctrine of *stare decisis,* holding that the principal case was governed by the decision in Commonwealth v. Alden, *supra.*

CONSTITUTIONAL LAW—EQUAL PROTECTION—STATUTE PROVIDING DIFFERENT PUNISHMENTS IN DIFFERENT PARTS OF THE STATE FOR SAME OFFENSE.—The New York Parole Commission Act (Laws 1915 c. 579, as amended by Laws 1916 c. 287) established different punishments in cities of the first class than elsewhere for the same offense. The relator, sentenced to fifteen months' imprisonment under this act for an offense the maximum imprisonment for which was one year (Penal Law [Consol. Laws c. 40] sec. 245), sought his discharge by *habeas corpus* proceedings on the ground that this act violated the Fourteenth Amendment of the Federal Constitution. *Held:* Writ dismissed. *People ex rel. Ward v. McCann,* 193 N. Y. S. 387 (1921).

Section 1 of the Fourteenth Amendment to the Constitution provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It has frequently been held to be within the legislative power of a state to declare that certain acts committed in a particular locality shall constitute a crime, while the same acts committed elsewhere are not a crime. People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124 (1889); People *ex rel.* Armstrong v. Warden, *etc.,* 183 N. Y. 223, 76 N. E. 11 (1905); People *ex rel.* Kipnis v. McCann, 191 N. Y. S. 574 (1921). The legislature can also impose a different punishment upon a corporation than that imposed upon an individual for the same offense. State v. Lumber Company, 24 S. D. 136, 123 N. W. 504 (1909); Small & Co. v. Commonwealth, 134 Ky. 272, 120 S. W. 361 (1909). A statute providing a heavier sentence in a case where the prisoner has been convicted twice before and committed to prison is not unconstitutional as denying him the equal protection of the laws. McDonald v.

Mass., 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. 389 (1901); Graham v. State of West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. 583 (1911). Nor is a statute unconstitutional which provides that infants tried and convicted may be sentenced to a state industrial school until they are 21 years old. State v. Cagle *et al.*, 111 S. C. 548, 96 S. E. 291 (1918).

The fact that the offender, sent to the reform school, is detained longer than if he had been sent to jail does not render such an act void as inflicting unequal penalties. *Ex parte* Liddell, 93 Cal. 633, 29 Pac. 251 (1892). Also, the legislature may recognize the youth of offenders and may modify the punishment or exempt them from punishment and such classification is valid where it operates in a uniform manner upon the class. McLaren v. State, 82 Tex. Crim. Rep. 449, 199 S. W. 811 (1917). But where a code fixes the punishment of a prisoner who escapes to a term equal to that which he was serving, such provision denies him the equal protection of the laws and is, therefore, unconstitutional. *Ex parte* Mallon, 16 Idaho 737, 102 Pac. 374 (1909). In the light of previous decisions, there can be no doubt that the statute involved in the principal case was a constitutional exercise of the legislative power.

CONSTITUTIONAL LAW—EXTENSION OF POLICE POWER UNDER THE KOHLER ACT.—A state statute in Pennsylvania prohibited the mining of anthracite coal under any dwelling situated in a township of three hundred or more inhabitants so as to cause a subsidence of the surface. The act allowed an injunction as a protective measure against any violations. Prior to the passage of the act, the defendants, having coal under the plaintiffs' land, purchased of the plaintiffs the right to mine it without assuming any obligation to support the surface. The plaintiff sought to restrain the defendant from carrying out the contract. The defense raised was the unconstitutionality of the act. *Held:* The act is constitutional. *H. J. Mahon and Margaret Craig Mahon v. Pennsylvania Coal Company,* No. 290, January Term, 1922 of Supreme Court of Pennsylvania. (Not yet reported.)

The states have the right to regulate their internal affairs except where expressly restricted from so doing by the Federal Constitution. This right of control is designated by a certain undefined term known as "police power." George W. Wickersham, "The Police Power and the New York Emergency Rent Laws," 69 U. OF PA. L. REV., 301 (1921); Comm. v. Plymouth Coal Company, 232 Pa. 141, 81 Atl. 148 (1911). The courts in various decisions have acknowledged that the states possess police power, but they have declared unconstitutional acts passed thereunder which "encroach upon the powers of the general government." N. O. Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252 (1885). A very broad decision held that "the authority of a State is complete, unqualified, and exclusive" in matters relating to police power. City of New York v. Miln, 11 Pet. 102, 12 L. ed. 357 (U. S. Sup. Ct. 1837). The modern tendency seems to be reverting to an extension in the police powers of a State, as is evidenced by the recent Rent Cases during the world war. Marcus Holding Brown Co. v. Feldman, 256 U. S. 170, 65 L. ed.

877, 41 Sup. Ct. 465 (1920); Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 Sup. Ct. 458 (1920). See 70 U. OF PA. L. REV. 48 (1922).

The act involved in the principal case was the Kohler Act. Act of May 27, 1921, P. L. 1198. Its constitutionality was attacked upon three grounds; first, it took property without due process of law; second, it impaired the obligation of contracts; third, it was local legislation. In answer to the first point courts have often held that the States have the power of restrictive legislation because of "the fundamental principle that every one shall so use his own as not to wrong and injure another." Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1037 (1878). Provided an act does not take private property for the use of the public without compensation, it is a valid application of police power if it is to offset an existing evil, or to prevent a public menace. Commonwealth v. Charity Hospital, 198 Pa. 270, 47 Atl. 980 (1901); Commonwealth v. Plymouth Coal Co., *supra.* State legislation which has forbidden the manufacture and sale of spirituous liquors has been held to be a valid exercise of police power, and not contrary to the Fourteenth Amendment of the Federal Constitution as it was to protect the health and morals of the state's citizens. Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. 273 (1887). The proposition advanced in the recent Rent Cases was that the situation during the World War "clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law." Block v. Hirsh, *supra.*

Considering next the second ground, the freedom of contract is not an absolute right, but is a qualified one subject to "reasonable regulations and prohibitions imposed in the interests of the community." Jacobsen v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. 358 (1904); Chicago, Burlington and Quincy R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. 259 (1910). The states reserve the right to modify certain contracts of public service corporations which involve rates. City of Scranton v. Public Service Commission, 268 Pa. 192, 110 Atl. 775 (1920). The right of police power is constant and cannot be limited or contracted away by a municipality or a state. Northern Pacific Railway Company v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. 341 (1908); City of Chattanooga v. Southern Ry. Co., 128 Tenn. 399, 161 S. W. 1000 (1913). Where the public necessity is great, the modification of a contract is held to be a valid exercise of police power and not a wrongful impairment of the obligation of contracts. Block v. Hirsh, *supra.*

The question as to the local character of the legislation can be answered briefly. Where laws arise from necessity, the designation of persons, objects or localities from other groups, is not local legislation, but general, as it limits all persons alike that are included in the group. Commonwealth v. Gilligan, 195 Pa. 504, 46 Atl. 124 (1900). The legislature has the power to make proper classifications, and the courts can determine whether "it is founded on real distinction in the subjects classified." Van Riper v. Parsons, 40 N. J. L. 123 (1878); Seabolt v. Commissioners, 187 Pa. 318, 41 Atl. 22 (1898).

The principal case would not, in the light of the above authorities, seem to be a drastic extension of police power. The legislation in the Rent Cases was

passed to meet a mere war emergency; the Kohler Act was framed to meet a grave public danger of unlimited duration. It is submitted the court did not err in declaring the act constitutional.

CONSTITUTIONAL LAW—SERVICE LETTER ACTS.—A state statute required corporations to give a discharged or resigning employee of ninety days' service or longer a letter stating the nature and duration of such employee's service, and the reason he left their service. The plaintiff voluntarily left the employment of the defendant corporation after ten years of service. The defendant refused to issue a letter in compliance with the above Statute. The defense raised was the constitutionality of the Statute. *Held:* The Statute is constitutional. *Prudential Insurance Company of America v. Robert T. Cheek,* U. S. Adv. Ops. 627 (1921), 66 L. ed. 627.

It was early settled at common law that the employer owed no duty to give his discharged employee a "character," and this same idea is still approved of in our more recent decisions. Carrol v. Bird, 3 Esp. 201, 6 Revised Rep. 824 (Eng. 1800); Cleveland, C. C. & St. L. Ry. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811 (1898). A number of states however, have adopted statutes similar to that of the principal case. Mont. Rev. Codes, secs. 1755-1757; Neb. Rev. Stat., 1913, secs. 3572-3574; Okla. Rev. Laws 1910, sec. 3769. In several instances such statutes have been held unconstitutional on the ground that they violated the employers' right of freedom of speech and implied liberty of silence assured by their State Constitutions and that of the Federal Government. Wallace v. Georgia, C. & N. R. Co., 94 Ga. 732, 22 S. E. 579 (1894); Atchison T. & S. F. R. Co. v. Brown, 80 Kan. 312, 102 Pac. 459 (1909); St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703 (1914).

It is submitted, however, that the court did not err in holding the Statute in the principal case constitutional. The Statute infringes on no constitutional right. It is really a protection to both the employer and the employee, as it assures the former of more easily obtaining the best workers out of employment, and gives the latter a much needed recommendation when in quest of a new position.

CONSTITUTIONAL LAW—EIGHTEENTH AMENDMENT—REMOVAL OF WHISKEY FROM ONE FOREIGN VESSEL TO ANOTHER IN A UNITED STATES PORT.—The plaintiff, a British corporation, contracted with a Scotch firm to transport a quantity of whiskey from Glasgow to Bermuda. It was shipped on a through bill of lading on one of the plaintiff's vessels and arrived in New York, where it was to be transferred to another foreign vessel running from New York to Bermuda. The defendant threatened to seize the liquor, whereupon the plaintiff brought a bill to enjoin him from interfering with the transshipment. The bill was dismissed in the District Court. *Held:* (McKenna, Day and Clarke, J. J., dissenting.) The dismissal was proper. *Anchor Line v. Aldridge,* U. S. Adv. Ops. 511, 42 Sup. Ct. 423 (1922).

The Eighteenth Amendment to the Constitution prohibits ". . . transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes . . ."

The Volstead Act, 41 Stat. 305, 308, provides that "No person shall . . . transport, import, export, deliver, furnish or possess any intoxicating liquor . . . and . . . this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

In the principal case it was contended that the removal in question was not such a "transportation" as was contemplated by either the Eighteenth Amendment or the Volstead Act. In Street v. Lincoln Safe Deposit Co. *et al.*, 254 U. S. 88, 65 L. ed. 151, 41 Sup. Ct. 31 (1920), the court held that the Volstead Act was inapplicable to the case where liquor was stored in a safe deposit room leased by the owner of the liquor, and that he could remove it to his home under proper permit. This decision is a striking application of the rule that a statute should not be construed so literally as to reach a decision manifestly against its spirit and intention. Church of the Holy Trinity v. U. S., 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. 511 (1892). In U. S. v. Gudger, 249 U. S. 373, 63 L. ed. 653, 39 Sup. Ct. 323 (1919), it was held that transportation of liquor through a state was not transportation into it, within the meaning of the Post Office Appropriation Act of March 3, 1917, 39 Stat. 1058, 1069. This position was stoutly upheld by the three dissenting justices in the instant case, who added that it is not the transportation, but the transportation for beverage purposes that is prohibited by the Volstead Act. The majority of the court, however, held that the letter of the law was too strong in this case. The minority also held that Rev. Stat. section 3005, Comp. Stat. sec. 5690, as amended by the Act of February 27, 1877, c. 69, sec. 1, and the Act of May 21, 1900, c. 487, sec. 1, which provides that merchandise arriving at any port in the United States destined for any foreign country may be conveyed through the United States without the payment of duties, was not repealed by the Eighteenth Amendment or the Volstead Act. The attitude of the minority is strengthened by Article XXIX of the Treaty with Great Britain, May 8, 1871, 17 Stat. at L. 863, which provides for the transportation through the United States of goods arriving at certain ports destined for British possessions in North America without the payment of duties. While there seems to be some doubt as to whether this article is still in effect, it has never been formally abrogated. See Treaties, Conventions, *etc.*, vol. I, 711 (1910); Messages and Papers of the Presidents, vol. IX, 335. The majority of the court considered this Article as not in effect, and even if it had been considered otherwise, their decision would have been the same, since they found that it conflicted with the Eighteenth Amendment and the Volstead Act.

It is submitted that the dissenting opinion commends itself to reason and justice and is worthy of serious consideration. Aside from the strictly legal aspect of the situation, the decision in the principal case may precipitate further economic developments unfavorable to our commerce and involve the government in unnecessary international disputes.

EQUITY—FRAUDULENT CONVEYANCES—AGREEMENTS TO RECONVEY.—The plaintiff, believing that a tort action was soon to be brought against him, conveyed to the defendant, his wife, certain property in order to save it from a possible judgment. His wife, at the time of the conveyance, agreed to re-

convey it to him whenever he wished. There was no evidence that the plaintiff had any creditors. No suit was ever commenced against him, and he sought reconveyance. This was opposed on the ground that, since the plaintiff conveyed with the intent to defraud creditors, he could not get relief in equity. *Held:* (Blackmar, P. J., and Jaycox, J., dissenting.) Reconveyance to plaintiff decreed. *Tiedeman v. Tiedeman,* 194 N. Y. S. 782 (1922).

It is a general rule that when a grantor has conveyed property in order to defraud his creditors, courts of equity will not enforce an agreement by the grantee to reconvey. Hershey v. Weiting, 50 Pa. 240 (1865); Pigg v. Casper Co., Inc., 196 Fed. 177, 116 C. C. A. 9 (1912); Lynch v. Jones, 177 App. Div. 613, 166 N. Y. S. 1047 (1917). For, "he who comes into equity must come with clean hands." Reynolds v. Boland, 202 Pa. 642, 52 Atl. 19 (1902); Decker v. Stansberry, 249 Ill. 487, 94 N. E. 940 (1911); Verne v. Shute, 232 Mass. 397, 122 N. E. 315 (1919).

One line of decisions is in accord with the majority view of the principal case, which held that the grantor did not bring himself within the bounds of the general rule, when he conveyed to the grantee with the intent to defraud creditors, if he did not have an actual creditor to be defrauded. Kerrick v. Mitchell, 68 Iowa 273, 24 N. W. 151 (1885); Hoff v. Hoff, 106 Kan. 542, 189 Pac. 613 (1920); Gargano v. Vollaro, 116 Atl. 179 (Conn. 1922). The purpose of the Fraudulent Conveyances Act is only to protect the equitable rights of creditors, and hence the mere motive actuating a conveyance, which in itself works no injury to creditors, is not sufficient to bring the conveyance within the statute. So, if there are no creditors, there is no fraud, and the grantor comes into equity with "clean hands." Riviera v. White, 94 Tex. 538, 63 S. W. 135 (1901); Brant v. Brant, 115 Iowa 701, 87 N. W. 406 (1901). See, in this connection, 49 U. OF PA. L. REV. 660.

Other courts have reached a decision in agreement with the minority view of the principal case, deciding that if the grantor conveys with the intent to defraud creditors, equity will not grant him relief, even though he had no present creditors. Poppe v. Poppe, 114 Mich. 649, 72 N. W. 612 (1897); Jolly v. Graham, 222 Ill. 550, 78 N. E. 919 (1906); Nunnally v. Stokes, 116 Va. 472, 82 S. E. 79 (1914). They consider that it is against public policy to take the broad view that equity should protect the grantor who conveyed with the motive of placing his property beyond the reach of the law. Tantum v. Miller, 11 N. J. Eq. 551 (1858). Furthermore, what actually happens is immaterial for equity sees moral turpitude in the intention of the grantor. Carson v. Beliles, 28 Ky. L. R. 272, 89 S. W. 208 (1905).

The majority view of the principal case represents the weight of authority. This was arrived at by the reasoning that it is more equitable for the courts to base their decisions on the effect of the grantor's conveyance than merely on his motive.

GIFTS—REVOCATION—CONDITION SUBSEQUENT IMPLIED.—The defendant had purchased some property and had the conveyance made to himself and his wife, the plaintiff, who afterward deserted him and lived in adultery with another. After the defendant had secured a divorce, the plaintiff brought a bill

for a division of the property and the defendant filed a cross-bill to establish title solely in himself. *Held:* The plaintiff is not entitled to a division, but, on the contrary, the husband will be vested with the sole interest, since fidelity was an impied condition to the gift. *More v. More,* 278 Fed. 1017 (D. C. 1922).

The plaintiff, in anticipation of marriage, had lavished many gifts on the defendant, who subsequently broke her engagement with him and married another. The plaintiff brought this action for the recovery of the gifts. *Held:* The plaintiff can recover. *Antaramiam v. Ourakian,* 194 N. Y. S. 100 (1922).

All authorities are agreed that a gift is irrevocable; Garner v. Graves, 54 Ind. 188 (1876); St. Joseph's Orphan Society v. Wolbert *et al.,* 80 Ky. 866 (1882); Williams v. Smith, 66 Ark. 299, 50 S. W. 513 (1899); but a transfer subject to an express condition, although commonly called a gift, has been held to be no gift at all. Irish v. Nutting, 47 Barbour 370 (N. Y. 1867); Hafer v. McKelvey, 23 Pa. Super. 202 (1903). Courts have found implied conditions in cases where it would be embarrassing for the donor to express the condition and this was the basic principle underlying the two instant cases. In Dickerson v. Dickerson *et al.,* 24 Neb. 530, 39 N. W. 429 (1888), it was decided that the wife by deserting her husband had violated an implied condition; whereas in Finlayson v. Finlayson, 17 Ore. 347, 21 Pac. 57 (1889), under like circumstances, the court did not imply a condition, and finding no fraud, would not allow the donor to recover the property. A middle ground was assumed in Snodgrass v. Snodgrass, 40 Kansas 494, 20 Pac. 203 (1889), where an equitable partition of the property was ordered. In many cases, previous misconduct or the contemplation of subsequent misconduct has been held to be such a fraud as will warrant the return of the property by the court. Stone v. Wood, 85 Ill. 603 (1877); Mildrum v. Mildrum, 15 Colo. 478, 24 Pac. 1083 (1890); Evans v. Evans, 118 Ga. 890, 45 S. E. 612 (1903). If, however, the wife has been guilty of some misconduct, of which the husband is cognizant when the gift was executed, then the gift is irrevocable. Chew v. Chew, 38 Iowa 405 (1874); Lister v. Lister, 35 N. J. Eq. 49 (1882).

The courts have been more willing to imply a condition to a gift where it was made in contemplation of marriage than they have in gifts between husband and wife—the cases being unvarying in the former instance. Young v. Burnell, Carey 54 (Eng. 1576); Williamson v. Johnson *et al.,* 62 Vt. 378, 20 Atl. 279 (1890); Burke v. Nutter, 79 W. Va. 743, 91 S. E. 812 (1917); Lumsden v. Arbaugh, 227 S. W. 868 (1922). However, this principle has certain limits, which were first laid down by Lord Hardwicke in Robinson v. Cumming, 2 Atk. 410 (Eng. 1742), when he stated in substance that if "a person has made addresses to a lady for some time upon view of marriage" and gives her presents and she disappoints him afterward, the presents should be returned, but when the presents are made merely to introduce a person to the woman's acquaintance, then they need not be returned. See also Thornton on Gifts & Advancements, sec. 98 and 117.

It is submitted that the decisions of the principal cases commend themselves to reason and our conceptions of justice. There is no doubt but that the donor in both cases, if asked whether fidelity in the one case and marriage in the other were conditions to the gift, would answer in the affirmative and, since to express these conditions would be improper and insulting, they should be implied.

INJUNCTIONS—RIGHT OF GOVERNMENT TO ACT IN LABOR DISPUTE UNDER THE CLAYTON ACT.—In furtherance of a conspiracy to aid and abet a strike on the part of certain railway employes, the defendants were committing certain unlawful acts of sabotage, and certain lawful acts such as individual picketing, persuading others to leave the railway employment, and also persuading others not to enter the railway employment. Because interstate commerce and the carriage of mails were being obstructed and jeopardized by this conspiracy, the United States applied for an injunction to restrain the parties to the conspiracy from committing such unlawful acts, and such lawful acts as were in furtherance of this unlawful conspiracy. *Held:* that the injunction be granted. *United States of America v. Railway Employee's Department of the American Federation of Labor et al.,* U. S. Dist. Ct., N. D. Ill., Equity case No. 2943 (1922). (Not yet reported.)

The right of the government to present a bill for such an injunction under its general equity jurisdiction is admitted, since the property of the United States is being jeopardized when the carriage of mails is interfered with, and since the injunction is necessary in order that the government may fulfill its obligation to protect the public. *In re* Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. 900 (1894). The court, moreover, may, under the Sherman Anti-Trust Act (26 Stat. L. 209) issue an injunction, where a conspiracy, whether of labor or capital, is impeding the free flow of interstate commerce. Northern Securities Co. v. U. S., 193 U. S. 197, 48 L. ed., 679, 24 Sup. Ct. 436 (1904); Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. 301 (1908). See Notes *supra,* p. 48.

The Clayton Act (38 Stat. L. 730), Sec. 6, forbids the restraining of labor organizations from carrying out their lawful objects. Lawful acts of a labor organization, if in furtherance of an unlawful restraint of interstate trade, become unlawful and can be enjoined, even under the Clayton Act. Duplex Printing Co. v. Deering, 254 U. S. 443, 65 L. ed. 349, 41 Sup. Ct. 172 (1920), criticized in 34 HARV. L. REV. 880, 886 (1921). The Clayton Act, Sec. 20, prohibits the enjoining of picketing and peaceful persuasion in any case between the employers and employes. Picketing is unlawful and can be restrained even under the Clayton Act, except when done by a single representative. American Steel Foundries v. Tri-City Trades Council, Adv. Ops. U. S. Sup. Ct., Oct. Term, No. 2 (1921), discussed in 70 U. OF PA. L. REV. 101 (1922). Any picketing or peaceful persuasion which interferes with interstate commerce may be enjoined, provided the action is not between the employers and employees. Duplex Printing Co. v. Deering, *supra.* In enacting that picketing and peaceful persuasion shall not be considered a

violation of any law of the United States this part of Sec. 20 of the Clayton Act has been held to apply only to cases between employers and employes. Since this Act limited the equity jurisdiction of the United States courts, it was said that it should be construed strictly. Duplex Printing Co. v. Deering, *supra.*

The injunction in the principal case seems to be proper and based on decided authority found in the Supreme Court decisions. It may be claimed that it is in conflict with the Clayton Act, but even in that statute, there is no obstacle to such an injunction, if it is construed as strictly as has been done by the Supreme Court in Duplex Printing Co. v. Deering, *supra.*

INSURANCE—MUTUAL COMPANIES—ASSESSMENTS TO MEET FUTURE LOSSES AND EXPENSES.—Plaintiff took out a policy in the defendant company by which he agreed to become "liable for all losses and expenses of said company" to the amount of his premium, the policy to be void if assessments to cover such "losses and expenses" be not paid within thirty days after demand. The plaintiff refused to pay an assessment levied to pay "future expenses." *Held:* Such assessment was valid, and failure to pay it forfeited the plaintiff's policy. *Knouse v. Mutual Fire Insurance Co.,* 78 Pa. Super. 542 (1922).

The right of directors to levy assessments upon a member of a mutual company is governed by the contract between the member and the company, and the charter and by-laws of the company. Rosenberger v. Washington Mutual Fire Insurance Co., 87 Pa. 207 (1878); Schultz v. Citizens' Mutual Life Insurance Co., 59 Minn. 308, 61 N. W. 331 (1894); Wolcott v. State Farmers' Mutual Insurance Co., 77 Neb. 742, 110 N. W. 628 (1907). In general, the directors may not levy assessments to pay future losses or expenses unless specifically authorized to do so by the contract. Peoples' Equitable Mutual Fire Insurance Co. v. Babbit, 7 Allen 236 (Mass. 1863); Thomas v. Whallon, 31 Barbour 172 (N. Y. 1857); Ibs v. Hartford Life Insurance Co., 121 Minn. 310, 141 N. W. 289 (1914). When a member agrees to be liable for "losses and expenses" of the company, the weight of authority is that the directors may levy assessments only to cover losses or expenditures which have already occurred. American Insurance Co. v. Schmidt, 19 Ia. 502 (1865); Farmers' Mutual Life Insurance Co. v. Knight, 162 Ill. 470, 44 N. E. 834 (1896); Johnson v. Hartford Life Insurance Co., 271 Mo. 562, 197 S. W. 132 (1917). In only one court of last resort has such a provision been construed so as to render the policy-holder liable to assessment to meet future losses. Kelly v. Troy Fire Insurance Co., 3 Wis. 254 (1854). This latter interpretation seems to hold also in Connecticut, although it has not there come before the Supreme Court. See Hartford Insurance Co. v. Ibs, 237 U. S. 662, 35 Sup. Ct. 692 (1915).

The principal case is one of first impression in Pennsylvania. While it seems expedient that the company should be allowed to accumulate a fund of reasonable amount for the prompt payment of future claims, yet the plaintiff never agreed to pay except for losses and expenditures which have

already occurred. And such seems to be the plain meaning of the clause that the plaintiff shall be liable only for "losses and expenses." This is the construction placed upon such a contract in a great majority of the cases, which have arrived at a decision contrary to that of the principal case. See Ann. Cas. 1914 C. 798.

MARRIAGE—ANNULMENT—FRAUDULENT MISREPRESENTATIONS AS TO CHARACTER.—A school girl, 18 years of age, relying on the defendant's representations that he was a veteran of the Great War, an employee of the United States Secret Service, and, in general, an honorable member of society, eloped with him and married him. A few weeks later, she, having in the meantime returned to school, discovered that the defendant was a professional swindler, whose life had been largely spent in penitentiaries, and who, shortly after the marriage, was arrested, convicted, and sentenced for further crimes committed before his marriage. She immediately ceased to have any further relations whatever with him, and brought suit for annulment of the marriage. *Held:* Marriage annulled. *Brown v. Scott,* 117 Atl. 114 (Md. 1922).

The fundamental rule is that a marriage procured by fraud is voidable at the suit of the injured party, only when the fraud touches what the law regards as the essentials of the marriage relation. Schouler, Marriage, Divorce, etc., 6th Ed., Sec. 1158. Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862). From both an historical and numerical standpoint, the more strongly established rule, both in England and in most of the American states, is that fraudulent misrepresentation or concealment as to the defendant's character, wealth, social position, previous history, or habits does not touch what the law regards as the essence of the marriage, and is not therefore, a sufficient ground for annulment. Wakefield v. Mackay, 1 Phillimore Ecc. 134 in note (Eng. 1807). Moss v. Moss, L. R. (1897), Prob. Div. 268 (Eng.); Wier v. Still, 31 Iowa 107 (1871); Hull v. Hull, 191 Ill. App. 307 (1915); Trask v. Trask, 114 Me. 60, 95 Atl. 352 (1915); Wilcox v. Wilcox, 171 Cal. 770, 155 Pac. 95 (1916); Chipman v. Johnston, 237 Mass. 502, 130 N. E. 65 (1921).

The departure from the strict letter of this rule in the principal case, in which the court decides that extreme fraud as to character and previous history is a sufficient basis for annulment, is countenanced in several other American jurisdictions. Keyes v. Keyes, 6 Misc. 355, 26 N. Y. S. 910 (1893); Entsminger v. Entsminger, 99 Kan. 362 (1916); Christlieb v. Christlieb, 71 Ind. App. 682, 125 N. E. 486 (1919); Gatto v. Gatto, 79 N. H. 177, 106 Atl. 493 (1919). In all jurisdictions which hold this modern view, non-consummation of the marriage seems to add much to the strength of the plaintiff's case, Corder v. Corder, 117 Atl. 120 (Md. 1922), and, in some, to be essential to its success. Cox v. Cox, 110 Atl. 924 (N. J. Eq. 1909).

No Pennsylvania decision dealing directly with the question of fraud as to character and past history, as a basis for divorce in the nature of annulment, has been found.

The principal case is representative of the law in a minor, yet grow-

ing, number of jurisdictions; its doctrine constitutes a departure from the long-established rule of the common law. It is submitted that this departure is dangerous, in its present undefined state, to the sanctity of the marriage status, though rendered less so by the unwillingness of the courts to apply it where consummation has taken place; but that, on the whole, it constitutes a judicial alteration of the law in conformity with the altered social ideas of modern times.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF GUESTS IN AUTOMOBILE.—The plaintiff's intestate, a minor girl, was killed when an automobile in which she was riding, driven by the defendant's minor son at sixty miles an hour, side-swiped another car. The evidence showed that she acquiesced in and encouraged the speeding which resulted in the tragedy. *Held:* Judgment for the plaintiff since the negligence of the driver of an automobile cannot be imputed to an occupant who had no control over the running of the car. *Tyree v. Tudor et al.*, 111 S. E. 714 (N. C. 1922).

It is now generally held that the doctrine of imputed negligence can not be applied where no relationship of principal and agent, or of master and servant exists. But a guest in an automobile is not thereby excused from the duty of using such care and caution as is reasonable. It is the duty of a passenger to warn the driver against speeding and recklessness. Hardie, *et ux.*, v. Barrett, 257 Pa. 42, 101 Atl. 75 (1917); Elling v. Blake-McFall Co., 85 Ore. 91, 166 Pac. 57 (1917); Russell v. Watkins, 49 Utah 598, 164 Pac. 867 (1917).

One who encourages or acquiesces in a breach of the rules of safe driving is guilty of contributory negligence, and is therefore barred from recovery if the driver's recklessness causes an accident. This principle applies whenever the negligence of the driver is such as would be evident to a reasonable man using ordinary care. So the occupant of a motor vehicle may be properly charged with negligence if he permits the driver to proceed at an unreasonable speed without remonstrance. Rebillard v. Minneapolis, *etc.*, Ry. Co., 216 Fed. 503, 133 C. C. A. 9 (1914); Fair v. Union Traction Co., 120 Kan. 611 (1918); Hill v. Philadelphia Rapid Transit Co., 271 Pa. 232, 114 Atl. 634 (1921).

It is therefore submitted that the Supreme Court of North Carolina, while correctly asserting that the negligence of the driver was not imputed to the plaintiff's intestate, overlooked the fact that the evidence clearly showed that the girl was guilty of independent negligence, which should have been a bar to the plaintiff's recovery. Renner, *et al.*, Appellants, v. Tone, *et al.*, Receivers, 273 Pa. 10 (1922), the most recent Pennsylvania case on the subject, substantiates this conclusion. There the plaintiff, a minor boy, made no remonstrance against the driver's proceeding on the wrong side of the street and at a too great rate of speed. The Supreme Court, while non-suiting him on other grounds, declared him guilty of contributory negligence as a matter of law.

Whether or not the occupant of a negligently driven car has himself used ordinary care is usually a question for the jury. But it seems that in the principal case, there was such a complete acquiescence in the recklessness of the driver as to make the plaintiff's intestate guilty of contributory negligence as a matter of law. Jepson v. Crosstown St. Ry., 129 N. Y. S. 233 (1911).

PRACTICE—JOINDER OF ACTIONS—SEVERAL DEFENDANTS.—The owner of an apartment house brought an action against seven tenants, each occupying a separate apartment in this house, to recover the reasonable rental value. The plaintiff demanded a separate judgment against each defendant. The defendants moved for an order to dismiss the complaint for misjoinder of defendants. *Held:* The joinder is proper under the Code. *S. L. & Co. v. Bock et al.,* 194 N. Y. S. 773 (1922).

Section 211 of the New York Civil Practice Act (Laws 1920, Ch. 925), provides that "all persons may be joined as defendants against whom any right to relief is alleged to exist, whether jointly, severally or in the alternative." Section 212 of the act provides that "it shall not be necessary that each defendant shall be interested as to . . . every cause of action included in any proceeding against him."

At common law, counts setting up different causes of action against separate defendants could not be joined. National Bank of Phoenixville v. Buckwalter, 214 Pa. 289, 63 Atl. 689 (1906); Battle v. Atlantic Coast Line Railroad Co., 132 Ga. 376, 64 S. E. 463 (1909). This was modified in England by the Rules of the Supreme Court, Order 16, Rules 4-5 (1883), from which the provisions of the New York Act, *supra,* have been taken verbatim.

The English courts at first construed this provision strictly, generally holding that separate tort-feasors could not be joined as defendants. Gower v. Coulridge, *et al.,* L. R. (1898) 1 Q. B. 348; Thompson v. London City Council, L. R. (1899) 1 Q. B. 840; Munday v. South Metropolitan Electric Light Co. *et al.,* 29 Times L. R. 346 (Eng. 1913). A count against one defendant in tort coupled with a count against another in contract was held to be misjoinder. Greenwood v. Greenwood, 100 Law Times R. 68 (Eng. 1909).

The more recent cases have been more liberal, generally construing these rules with reference to Order 16, Rule 1, as amended in 1896, which allows joinder of plaintiffs in any case "where if such persons brought separate actions, any common question of law or fact would arise." Osterreichische Export A. G. Co. v. British Indemnity Insurance Co. *et al.,* L. R. (1914) 2 K. B. 747. Thus, the courts have allowed the joinder of several tort-feasors as defendants. *Re* Beck, Attia v. Seed, 118 Law Times R. 629 (Eng. 1918); Thomas v. Moore, L. R. (1918) 1 K. B. 555. It has also been held proper to join counts against several defendants in contract, when the alleged contracts relate to the same subject-matter, or arose out of the same transaction. Compania Sansinena v. Houlder Bros. & Co., *et al.,* L. R. (1910) 2 K. B. 354; Payne v. British Times Recorder Co. *et al.,* L. R. (1921) 2 K. B. 1.

The New York court has held that counts against three defendants in the alternative for reasonable rental value could not be joined with a count against two of them for damage to the property from their occupation, because the causes of action did not arise out of the same transaction. 137 E. 66th St., Inc. v. Lawrence *et al.,* 194 N. Y. S. 762 (1922). Both in this case and in the principal case the court follows the English rule in construing these provisions with reference to Section 209 of the Practice Act, which is taken from Order 16, Rule 1, of the English Rules of the Supreme Court, *supra.*

The statutes, both in England and New York, leave the enforcement of

these provisions within the discretion of the court. England: Rules of the Supreme Court, Order 16, Rule 1; New York: Laws 1920, Ch. 925, Sec. 191. But the tendency of the English cases seems to be towards an increasingly liberal construction of the statute. The decision in the principal case is in keeping with this tendency, and seems in accord with the liberal spirit of the statute.

TRADE UNIONS—SUITS AGAINST UNIONS—SHERMAN ANTI-TRUST LAW.—The plaintiffs were coal companies whose properties had been greatly damaged by strikers and whose business had been interfered with by union miners intimidating the non-union men employed by them. They sued the United Mine Workers of America, its officers, and the local district of the union. One of the defenses was that the union was an unincorporated body and could not be sued. *Held:* The union could be sued under Sec. 7 of the Sherman Anti-Trust Act. *United Mine Workers of America v. Coronado Coal Co., et al.*, U. S. Adv. Ops. 643, 42 Sup. Ct. 750, 66 L. ed. 643 (1922).

This same case was treated fully in 66 U. OF PA. L. REV. 267, where the decision of the Circuit Court was commented on and, as that decision was affirmed by the Supreme Court in respect to the above-mentioned point, no discussion will be given here. Another feature of the case is treated in Notes, *supra*, p. 48.

TRESPASS—AVIATOR FLYING LOW OVER LAND.—The prosecutor made an information under the Pennsylvania Act of April 14, 1905, P. L. 169, against the defendant, an aviator, for an alleged trespass in flying over his land, on which "no trespassing" notices were posted, at a height varying between fifty and three hundred and fifty feet. *Held:* It was not within the contemplation of the legislature to make an aeroplane flight over land an unlawful trespass punishable under this act. *Commonwealth v. Nevin and Smith,* Court of Quarter Sessions of Jefferson County, Pa., April, 1922. (Unreported.)

This case holds simply that under the present Pennsylvania Act making a trespass upon posted lands unlawful, an aviator commits no offense against the Commonwealth by flying over the land of another. It does not decide whether the defendant has or has not infringed the private rights of the plaintiff and rendered himself liable in the civil action of trespass *quare clausum fregit.* The public press generally misconstrued the decision and reported it as holding that an aeroplane flight over land was not a trespass.

The civil aspect of the situation must undoubtedly some day arise in this country, and when it does it will be *de novo.* Every property owner, provided he does not erect a nuisance, has an undisputed right to build so far into the air as is possible. *Cujus est solum ejus est usque ad cœlum.* That this ancient maxim was not unqualifiedly true was first suggested by Lord Ellenborough in Pickering v. Rudd, 4 Campbell 219 (Eng. 1815), where he ridiculed the idea that a baloonist might be liable in *quare clausum fregit* to a farmer over whose field he sailed. See the note in Bohlen's Cases on Torts, Vol. I, p. 40.

While our courts would probably not sustain an action of trespass against an aviator who flew high above the ground, it seems likely that passing through what has been called the usable air column would be an infringement of property rights. Ample authority can be found in foreign jurisdictions to support this view. The British Air Navigation Act, 1920, section 9 (1), provides that "no action shall lie in respect of trespass . . . by reason of the flight of aircraft over any property at a height above the ground . . . which is reasonable." This act vindicates the position of Sir Frederick Pollock in his Law of Torts, 8th ed., p. 348, where he states the reasonable rule to be that "the scope of possible trespass is limited to that of effective possession." The German Imperial Code of 1900, S. 905, established this doctrine when it said: "The right of the owner of a piece of land extends to the space above the surface . . . The owner may not, however, forbid interference which takes place at such a height . . . that he has no interest in its prevention." France in three cases adopted a similar view. 53 AMER. L. REV. 732 (1919).

It is to be hoped that this doctrine will soon become the accepted American rule. To hold that an individual owns the air *usque ad cœlum* would effectively blast, or at least hopelessly retard, the progress of aviation. But undoubtedy property owners must be protected from the noise and danger of low-flying planes. Under this doctrine the upper strata of the air, like navigable water, would be free to all while the usable air column would belong to the owner of the land. An invasion of the latter would render the aviator liable in *quare clausum fregit.*

TRUSTS—CHARITABLE USE—BEQUEST TO PROCURE CHANGE IN EXISTING LAWS.—The testator left certain bequests in trust to promote reforms in government such as the initiative, referendum, recall, etc., by advocating changes in existing legislation. It was contended that the bequest was invalid as being opposed to public policy. *Held* (Schaffer, J., dissenting): The trust is valid. *Taylor v. Hoag et al.,* 273 Pa. 194 (1922).

It has always been an established principle that charitable donations opposed to the laws of the land are illegal. Thus a bequest of slaves in trust, that they be set free in violation of a state statute, was declared void. Finley v. Hunter, 2 Strob. Eq. 218 (S. C. 1848). Likewise a gift for procuring the discharge of persons confined under sentence for breach of criminal law was held invalid, Thrupp v. Collet, 26 Beav. 125 (Eng. 1858); and where a bequest was dependent upon the validity of a devise of land which devise was illegal, the trust was not sustained. Levy v. Levy, 33 N. Y. 97 (1865). So in England, a bequest to promote a religious faith, contrary to statute was void. Da Costa v. De Pas, 1 Amb. 228 (Eng. 1754); *In re* Bedford, 2 Swans. 471 (Eng. 1819); De Themmines v. De Bonneval, 5 Russ. 288 (Eng. 1828).

A trust will not be supported in Pennsylvania where its object is propagation of atheism, infidelity, immorality or in hostility to existing forms of government. Updegraff v. Commonwealth, 11 S. & R. 394 (Pa. 1824); Vidal v. Girard's Executors, 2 Howard 127 (1844); Zeisweiss v. James, 13 P. F. Smith 465 (Pa. 1870).

But the court in the principal case distinguishes between a proposition necessitating a violation of the law and one attempting to change the existing law by lawful means. That distinction has been the basis for the decisions of the majority jurisdictions where a marked tendency is displayed to construe with considerable liberality all similar bequests. Thus a bequest to a library was held not to be invalidated by a condition that no book should be excluded because of its differing from conventional notions on subjects of morals, medicine and the like. Manners v. Philadelphia Library Co., 93 Pa. 165 (1880). In Lewis' Est., 152 Pa. 477, 25 Atl. 878 (1893), a trust created to destroy all discrimination against the colored race in America was held valid despite the existence of laws in southern states requiring carriers to provide separate cars for colored persons. In England a bequest to abolish vivisection was declared to be a legal charity although the purpose of the gift involved the repeal of an Act of Parliament. Re Foraux, 2 L. R. Ch. Div. 501 (Eng. 1895). Similarly, bequests for the suppression of the liquor traffic before the prohibition amendment had been adopted were repeatedly held to be charitable trusts. Haines v. Allen, 78 Ind. 100 (1881); Harrington v. Pier, 105 Wis. 485, 82 N. W. 345 (1900); Buell v. Gardner, 144 N. Y. S. 945, 83 Misc. 513 (1914).

The modern interpretation of a charitable bequest was perhaps carried to its extreme in the case of George v. Braddock, 45 N. J. Eq. 757, 18 Atl. 881 (1889), where it was decided that a gift to a notoriously radical author for the distribution of books in which the existing system of holding land was bitterly attacked, was valid, thus overruling the decision of the lower court in Hutchin's Executors v. George, 44 N. J. Eq. 124, 14 Atl. 108 (1888). The case of Garrison v. Little, *et al.*, 75 Ill. App. 402 (1898) held that a trust to further advocacy of a change in the constitution for the attainment of woman's suffrage in the United States was valid, opposing Jackson v. Phillips, 96 Mass. 539 (1867), which represents the minority view in this country. In that case such a bequest was adjudged invalid as being opposed to public policy. But in the same case a trust, created by the same instrument, for the benefit of fugitive slaves was allowed as a valid charitable use despite the fact that at the time harboring such fugitives with knowledge was directly opposed to the laws sanctioning the system of slavery as it then existed. That inconsistency led to much unfavorable criticism and finally culminated in the rejection, in the most important jurisdictions of this country and England, of that part of the Massachusetts decision which stamped illegal, as a class, all charitable trusts having as their object a change in existing legislation.

If the Massachusetts view should be followed to its logical conclusions, legislative reform would be seriousy hampered and legitimate efforts toward efficiency in government would be discouraged. The majority view in the principal case, therefore, it is submitted, is the proper one.

VEHICLES—HAND SLED AS WITHIN AN ACT IN REGULATION THEREOF.—In an action of trespass for personal injuries suffered by the plaintiff in a collision between his hand sled and the automobile of the defendant, the question arose as to whether the plaintiff's sled should have carried a light as pro-

vided for by the laws of Pennsylvania, Act of June 12, 1919, P. L. 451, which requires, in part: "That . . . from one hour after sunset until one hour before sunrise, . . . there shall be displayed on every vehicle, excepting agricultural machinery and such as are propelled by hand or are loaded with hay or straw in bulk, while standing or in motion upon any public highway in the State of Pennsylvania, at least one white light. . . . But nothing in this act shall affect motor vehicles." *Held* (Schaffer, J., dissenting): A hand sled is not a vehicle within the contemplation of the statute, and therefore is not subject to the provisions of the act. *Idell v. Day,* 273 Pa. 34, 116 Atl. 506 (1922).

The word "vehicle" has been defined as "any carriage moving on land, either on wheels or runners; a conveyance; that which is used as an instrument of conveyance, transportation, or communication," Davis v. Petrinovich, 112 Ala. 654, 21 So. 344 (1896); or as including "every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land." U. S. Comp. Statutes (1901), sec. 4.

Courts have held that the word "vehicle" includes within its meaning: a bicycle, State v. Collins, 16 R. I. 371, 17 Atl. 131 (1888); Holland v. Bartch, 120 Ind. 46, 22 N. E. 83 (1889); Commonwealth v. Forrest, 170 Pa. 40, 32 Atl. 652 (1895); a dray, City of Memphis v. Battaille, 8 Heisk 524 (Tenn. 1873); Mayor, etc., of Griffin v. Powell, 64 Ga. 625 (1880); a sleigh, covered, and carrying six passengers, Marselis v. Seaman, 21 Barb. 319 (N. Y. 1856); a threshing machine, Heib v. Town of Big Flats, 66 N. Y. App. 88, 73 N. Y. S. 86 (1901); a street sprinkler, City of St. Louis v. Woodruff, 71 Mo. 92 (1879); a horse-drawn ambulance, People v. Little, 86 Mich. 125, 48 N. W. 693 (1891); and a street-car, Frankford Railway Co. v. City of Philadelphia, 58 Pa. 119 (1868); Bridge Co. v. Railroad Co., 114 Pa. 478, 8 Atl. 233 (1886); Foster v. Curtis, 213 Mass. 79, 99 N. E. 961 (1912). *Contra,* as to a street-car, Whitaker v. 8th Avenue Rwy. Co., 51 N. Y. 295 (1873).

The word has been held not to include: a ferryboat, Duckwall v. City of New Albany, 25 Ind. 283 (1865), nor locomotives and railway cars, Baltimore and Ohio R. R. Co. v. District of Columbia, 10 App. D. C. 111 (1897).

It is submitted that the above decisions are amply sufficient to uphold the broad definitions of the word given above; and that the narrow interpretation of its meaning adopted by the majority of the court in the principal case is unsupported by authority and by the context of the act. In the absence of any indications in the act itself of an intention on the part of the legislature to limit the application of the act to a greater extent than that by which such application is specifically limited, it seems that the court should have applied the act to a sled as being a vehicle within the usual meaning of the word.

VOLSTEAD ACT—COMMON NUISANCE DEFINED.—The plaintiff-in-error was convicted of maintaining a nuisance under Title II, Sec. 21 of the National Prohibition Act of October 28, 1919 (41 Stat. 314). He brought a writ of error on the ground that the indictment alleged that liquor was kept on his premises for a single day, whereas several days' possession should have been

alleged. *Held:* The indictment was sufficient. *Feigin v. United States*, 279 Fed. 107 (C. C. A. 9th Circ. 1922).

On motion to quash an indictment for maintaining a common nuisance under Title II, Sec. 21, of the Prohibition Act, the defendant contended that the allegation "the defendants . . . did keep . . . cases of intoxicating liquors on board a certain launch" was insufficient since "maintaining," under the act, implies continuance. *Held:* The indictment was insufficient. *United States v. Dowling, et al.*, 278 Fed. 630 (D. C. S. D. Fla. 1922).

Government agents having made four purchases of alcoholic beer of the defendant, the plaintiff asked for an injunction under Title II, Sec. 22, of the Prohibition Act to abate the nuisance. *Held:* The plaintiff is entitled to the relief prayed for, because a single sale accompanied by the unlawful possession of other liquor is sufficient to warrant an injunction. *United States v. Eilert Brewing & Beverage Co.*, 278 Fed. 659 (D. C. N. D. Ohio 1921).

Defendant moved to dismiss a bill of complaint filed to enjoin a nuisance under Title II, Sec. 22, of the Prohibition Act, upon the ground that the allegations should show that the liquor was habitually sold instead of merely stating that liquor was "sold and kept" for sale. *Held:* The motion must be granted. *United States v. Butler, et al.*, 278 Fed. 677 (D. C. E. D. N. Y. 1922).

The National Prohibition Act of October 28, 1919, *supra*, Title II, Sec. 21, defines a common nuisance as "any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title."

At common law, any person had the right or privilege without a license to keep and maintain an ale house. Stephens v. Watson, 1 Salk. 45 (Eng. 1689-1712); Commonwealth v. McDonough, 13 Allen 581 (Mass. 1866); 1 Bishop, Criminal Law, 8th Ed., Sec. 505. It was only when the ale house became disorderly that it was considered a common nuisance. Stephens v. Watson, 1 Salk. 45 (Eng. 1689-1712); State v. Bailey, 21 N. H. 343 (1850); 4 Blackstone's Commentaries 167.

Commencing with the Act of the British Parliament in 1552 (5 & 6 Edw. VI), numerous statutes have been passed in England and the United States restricting the sale of liquor and making its sale in certain places a common nuisance. Compiled Laws of Kansas, 1881, Chapter 35, Sec. 13; Iowa Code 1897, Sec. 2384; Compiled Laws of North Dakota, 1913, Sec. 10117. Under these statutes it is quite well established that a single sale is not sufficient to constitute a nuisance. Commonwealth v. Patteron, 138 Mass. 498 (1885); Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205 (1887), 8 Sup. Ct. 273; Maine v. McIntosh, 98 Me. 397, 57 Atl. 83 (1903). In Bepley v. The State, 4 Ind. 264 (1853), however, it was decided that a single sale is sufficient if accompanied by the possession of other liquor; and a single sale alone was held sufficient in State v. Reyelts, 74 Iowa 499, 38 N. W. 377 (1888); Scott v. State, 37 N. D. 90, 163 N. W. 813 (1917).

The Federal Courts of the United States in interpreting "common nuisance" under the Volstead Act have shown much the same divergence of opinion as did the state under their respective statutes. In an indictment under Sec. 21,

the principal cases illustrate the two views the courts have taken when possession of liquor but no sale has been proved: Feigin v. U. S., *supra,* holding the possession for one day sufficient and U. S. v. Dowling, *supra,* holding that the possession should be continuous. Several courts have held that a single sale of liquor accompanied by the unlawful possession of other liquor will warrant an indictment. Wiggins v. U. S., 272 Fed. 41 (C. C. A. 2nd Circ. 1921); Young v. U. S., 272 Fed. 967 (C. C. A. 9th Circ. 1921).

Under Sec. 22, U. S. v. Cohen, 268 Fed. 420 (D. C. E. D. Mo. 1920), accords with U. S. Butler, *supra,* in holding that liquor must be continuously sold to warrant an injunction; while Lewinsohn v. U. S. 278 Fed. 421 (C. C. A. 7th Circ. 1922), accords with U. S. v. Eilert Brewing & Beverage Co., *supra,* in holding that one sale together with the possession of other liquor is sufficient.

It would seem that the reasoning of Judge Faris in U. S. v. Cohen, *supra,* is especially commendable. He states that, whereas one sale coupled with the possession of other liquor may warrant a criminal indictment under the Volstead Act, yet when an injunction is sought to enjoin the maintenance of a "common nuisance" the complaint should then allege continuous acts by the defendants.